Harrah's Lake Tahoe Resort Casino *and* Larry T. George. Case 32–CA–11182

April 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 10, 1991, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

Contrary to our dissenting colleague, we agree with the judge that employee Larry George's activities on behalf of his proposal for the employee stock option plan (ESOP) to purchase 50 percent of Promus Corporation, the Respondent's parent corporation, are not protected by Section 7 of the Act. George prepared a petition and a three-page summary of his proposal which he used to solicit employee support. He also distributed a leaflet briefly outlining his plan. The proposal concerned a leveraged buyout of Promus Corporation by the ESOP. Specifically, George proposed that the ESOP borrow $335 million to purchase 50 percent of the outstanding Promus stock and assume $450 million of Promus' corporate debt. George explained that the current employees would benefit from his proposal through increased job stability, pay, and pension funding and from enhanced morale, productivity, and profitability through ''participatory management.''

There is no question that George's activities were concerted. The sole issue is whether George's activities are protected within the mutual aid or protection provision of Section 7 of the Act, which turns on whether his proposal relates to ''employees' interests as employees.'' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978). For the following reasons, we agree with the judge that the relationship of George's proposal to employees' interests as employees in ''so attenuated that [the] activity cannot fairly be deemed to come with the 'mutual aid or protection' clause.'' *Eastex* at 568.

[1] The citation to *Nephi Rubber Products Corp*., relied on by the judge, is 303 NLRB 151 (1991).

[2] The judge inadvertently omitted the standard notification provision from his recommended Order. We shall, accordingly, modify the Order to correct this oversight.

The dissent correctly points out that George's proposal envisioned enhanced benefits for current employees and was not designed solely to product changes in management. The fact remains, however, that the thrust of the proposal was to cast employees in the role of owners with ultimate corporate control, and thus fundamentally to change how and by whom the corporation would be managed. The current employees would not enjoy any of the envisioned benefits unless and until they, through the ESOP, effectively controlled the corporation.[3] It is not surprising that, other than the implication from the phrase ''participatory management'' that there would be new additions to management ranks, the proposal did not specify any particular management changes. If the goal of gaining majority stock ownership were achieved, neither the ESOP nor the employees would need to actively run the business in order to exercise effective control. We agree with the judge that any 50-percent shareholder, including an ESOP trust, would as a practical matter exercise effective control over every detail of corporate policy. In sum, although George presented his proposal within the employee-employer relationship, the proposal was designed to change that relationship.

Although the cases cited[4] by the judge are factually distinguishable because they did not involve improved benefits for employees, we find that the underlying rationale of those cases supports our decision in this case. The test of whether an employee's activity is protected within the mutual aid or protection provision is not whether it relates to employees' interests generally but whether it relates to ''the interests of employees qua employees.'' *G & W Electric Speciality Co*., 154 NLRB 1136, 1137 (1965). Contrary to our dissenting colleague, we do not view the envisioned benefits for current employees as bringing the proposal within the mutual aid or protection provision of Section 7 of the Act. We agree with the judge that the proposal does not advance employees' interests as employees but rather advances employees' interests as entrepreneurs, owners, and managers.[5] Accordingly, we affirm the judge's decision.

[3] Furthermore, while the proposal emphasized benefits to employees, it entailed a substantial enterpreneurial risk—a hefty debt—that current employees would have to assume.

[4] *Good Samaritan Hospital*, 265 NLRB 618 (1982); *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980); *N.Y. Chinatown Senior Citizens Coalition*, 239 NLRB 714 (1978).

[5] In order contexts the Board has long recognized the difference in interests between employees as employees and employees as owners. For example, employee-stockholders are excluded from bargaining units when they collectively have an effective voice in determining or formulating corporate policy through their authority to select directors. *Sida of Hawaii, Inc*., 191 NLRB 194, 195 (1971); *Red & White Airway Cab Co*., 123 NLRB 83, 85 (1959).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Harrah's Lake Tahoe Resort Casino, Stateline, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Add the following as paragraph 2(c).

''(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.''

Elaine D. Climpson, Esq., for the General Counsel.
John D. Feldman III, Esq. (Proskauer, Rose, Goetz & Mendelsohn), of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Larry T. George, an Individual, filed an unfair labor practice charge against Harrah's Lake Tahoe Resort Casino (Respondent or Company) on June 7, 1990.[1]

On July 31, the Regional Director for Region 32 of National Labor Relations Board (NLRB or Board) issued a complaint alleging Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act (Act). A notice of hearing before an administrative law judge (ALJ) is incorporated in the complaint.

The complaint alleges that Respondent's supervisors interfered with employees' right to organize and to distribute literature, and discharged George for a period of approximately 2 weeks because he engaged in activities protected by Section 7 of the Act.

Respondent denied that it engaged in the unfair labor practices alleged and asserted affirmatively that the complaint failed to state a claim upon which relief could be granted.

I heard this matter on November 15, 1990, at South Lake Tahoe, California. Having now carefully considered the record, the credibility of the witnesses, and the posthearing briefs of the General Counsel and the Respondent, I have concluded that Respondent, with one exception, did not violate the Act as alleged on the basis of the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Respondent, a Nevada corporation, is one of the leading hotel, restaurant, and casino facilities along the south shore of Lake Tahoe at Stateline, Nevada.[2] This and other similar properties in New Jersey and Nevada are owned by the Promus Companies (Promus). Only the Stateline facility is involved in this proceeding.

During its seasonal peak, Respondent employs approximately 3300 individuals at the Stateline facility; about 300 of these employees work in the casino's pit department. George has been employed as a dealer in Respondent's pit department for approximately 6 years; he is remarkably loyal and dedicated to the Respondent and is regarded by his supervisors as an excellent employee.

During the relevant period, George dealt at a baccarat table on the swing shift, from 6 or 7 p.m. until 2 or 3 a.m. Pit department employees are provided a 20-minute rest break at the end of each hour of work. Employees are expected to spend this break period in an employee cafeteria or a rest lounge on the bottom floor of the casino.[3]

Under long-established rules, employees are prohibited from soliciting ''in public areas'' at any time and from distributing literature ''in working areas.'' Additionally, employees may not solicit or distribute literature during ''working time'' which is defined to exclude break periods, meal times, or other periods during the workday when employees are ''properly not engaged in performing their duties.'' Generally, employees are authorized to be on the premises for 1 hour before and after their scheduled shifts; at other times employees are treated as customers of the facility.

Respondent provides its employees standard fringe benefits including a savings and retirement plan. This plan has two elements, a qualified 401(k) arrangement and an employee stock ownership plan (ESOP). One percent of the Promus stock—which is traded publicly—is dedicated to the ESOP and each employee receives at least one share of Promus stock under this plan after a specified tenure.

Apparently after considerable study, George circulated a complicated proposal in January 1987 to revise the existing ESOP plan. Essentially, his proposal called for employees—acting through the ESOP trust—to acquire ownership of 100 percent of the Promus stock. Under the proposal, the ESOP trust would leverage the Promus future income to acquire the necessary capital to buy out other stockholders. George foresaw a variety of tax and other similar advantages which would cause this proposal to be financially beneficial to all concerned. However, he failed to interest any high-level management official in his proposal and it essentially languished as his dream for the next 3 years.

2. Rebirth of the ESOP proposal

Sometime in March, Respondent's employees were notified that an opportunity would be provided for them to speak individually with Respondent's president and chief executive officer, Phil Satre, via a special 800 telephone number on March 22 about their work concerns. George saw this as an opportunity for employees to lobby Satre on behalf of his ESOP concept with the hope that Satre, in turn, would

[1] All dates refer to the 1990, if not shown otherwise.

[2] Respondent's direct inflow of goods and services in the 12-month period prior to issuance of the complaint exceeds a de minimis amount and is sufficient to establish that it is engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent's gross revenues for the same period exceed the amount established by the Board for exercising its statutory jurisdiction. Accordingly, I find that it would effectuate the policies of the Act for the Board to resolve this dispute.

[3] The rest lounge consists of two rooms. One room has a television set and seating areas for employee use; the other is designed as a reading room.

MEMBER DEVANEY, dissenting.

The complaint in this case alleges, in substance, that the Respondent violated Section 8(a)(1) of the Act by interfering with employees' rights to distribute literature and by discharging employee George for distributing leaflets to gain employee support for his Employee Stock Option Plan (ESOP) proposal.[1] The judge found that George's activities on behalf of his ESOP proposal were not protected by the mutual aid or protection clause of Section 7 of the Act because the ''strategic overall objective'' of the proposal was to transfer ownership and control of the Respondent to the employees, and any benefits that would flow to employees presupposed corporate ownership. Finding that the Respondent was therefore ''at liberty to bar George's ESOP distributions altogether,'' the judge concluded that the Respondent did not violate the Act as alleged.[2] Contrary to my colleagues, I would reverse the judge and find that George's distribution and solicitation activities on behalf of the ESOP proposal were protected under the Act.

The Respondent's savings and retirement plan for its employees consists of a qualified 401(k) plan and an ESOP. Under the existing ESOP, qualified employees receive on an annual basis one share of stock in the Respondent's parent company, Promus Corporation. The Promus stock is publicly traded and 1 percent of the stock is dedicated to the Respondent's ESOP. The Respondent's 401(k) plan allows employees to make their fund contributions from several sources, including Promus stock.

George proposed that the ESOP borrow $335 million to purchase 50 percent of the outstanding Promus stock and assume $450 million of Promus' corporate debt. The debt would be serviced by operating income. George prepared a written proposal, directed to the chairman of the Promus Corporation, which he also distributed to the Respondent's employees. After receiving complaints from employees that the proposal was too technical, George prepared a leaflet entitled ''Money for Nothin''' for distribution to the employees.

In finding that George's activities on behalf of his ESOP proposal were not protected, the judge relied on the administrative law judge's decision in *Nephi Rubber Products Corp.*, 303 NLRB 151, 158–159 (1991), and cases cited therein. In *Nephi*, the employer closed its plant and filed for bankruptcy. Subsequently, the union representing the affected employees initiated the formation of an ESOP group to pursue the possibility of reopening the plant. To this end, the ESOP group, which consisted of former plant management, bargaining unit members, and city government officials, raised money and sought loans and grants in order to purchase the plan. The Board in *Nephi* adopted the judge's finding that employee participants in the ESOP who competed against the respondent as purchasers were not engaged in protected activity because they were acting to improve their lot as entrepreneurs and were trying to substitute themselves as management. In so finding, the judge in *Nephi* cited, inter alia, *Retail Clerks Local 770*, 208 NLRB 356, 357 (1974), for the propsition that employee activity designed solely to influence or produce changes in the management hierarchy is protected by Section 7 of the Act.[3]

In my view, the following facts demonstrate that George's activities on behalf of his ESOP proposal bear an immediate relationship to employees' interests as employees, and are therefore protected by Section 7 of the Act under *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). First, it is clear that in the instant case, unlike the activity in *Nephi* and *Retail Clerks*, above, George's ESOP proposal was not designed *solely* to produce changes in management. At the time George presented his proposal, the Respondent's employees were able to own Promus stock through the existing ESOP and the 401(k) plan, which had been granted and maintained by the Respondent as economic benefits and were clearly terms and conditions of employment. Further, it is evident from the language of the leaflets that the primary objective behind the ESOP proposal was to increase employee compensation by enhancing the existing benefit programs.

The ''Money For Nothin'' leaflet that George prepared for the employees stated in pertinent part:

> Our ESOP Trust borrows money from a commercial bank to buy 50% of Promus stock for the employees.
>
> Since the employees then own 50% of the stock, we get 50% of the operating income (''profits'').
>
> For the following 10 to 15 years, we use our share of the profits to pay off the bank loan.
>
> At the end of 10 years, each employee owns stock which could be worth as much as 3 times his annual earnings (salary plus tips). If we leave sooner, we get less. If we stay longer, we get more.

The remainder of the leaflet explained why ''the stock costs us nothin'!'' and suggests that the employees can

[1] George's discharge was later converted to a suspension.

[2] I agree with my colleagues' adoption of the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by requiring George after his reinstatement to submit any future leaflets to the Respondent for approval before distribution.

[3] In *Retail Clerks*, the Board found that the respondent employer-union did not violate Sec. 8(a)(1) by discharging certain employees who had engaged in internal union electioneering activities in an effort to effect a change in the union's top management. The Board emphasized that the employees were not engaged in organizing activities to seek a separate representative, and that they were not seeking to redress grievances within the frame work of the employer-employee relationship.

promise to the Respondent, in return ‘‘one of the most dynamic and profitable service companies in America.’’ Significantly, this leaflet does not even refer to an increased managerial role by the employees who become part owners of the Respondent, but focuses on the extent of the profits that would accrue to the employees if they were to own 50 percent of the stock and, indeed, the leaflet is bordered by dollar signs. George’s written proposal outlines the benefits that would flow to employees if the proposal were implemented. Although the proposal mentions ‘‘participatory management’’ in terms of enhanced ‘‘morale, productivity, and profitability,’’ its focus on the monetary benefits that would result makes clear that the proposal, rather than being intended solely to produce changes in management, was aimed at improving the savings and retirement benefits offered to employees. In this regard, the proposal lists as benefits the estimated value of the ESOP account after 15 years, secondary income from benefits and profit sharing, increased employee compensation as a percentage of gross revenue, sellers of stock receiving market value for their shares, and reinforced stock valuation. Finally, the proposal refers to the ‘‘windfall compensation’’ that employees would receive. The focus of this literature makes it impossible to conclude that the ESOP was designed solely to produce changes in management. See *Retail Clerks*, above.

This case is unlike the precedent relied on by the judge for the further reason that George presented his proposal to the Respondent within the framework of the employer-employee relationship. In fact, George’s ESOP activities were prompted by the request of the Respondent’s president to employees to contact him with their work-related concerns via a special toll free number. George submitted his proposal at a time when both the Respondent and its parent corporation were promoting the ownership of stock by employees, and the Respondent was considering an employee stock purchase program. By contrast, the ESOP group in *Nephi* was not limited to former employees. The unique facts of that case are not subject to the interpretation that the ESOP was working in the context of an employer-employee relationship to gain improved economic benefits. Rather, the judge found that during the relevant period, the sole purpose of the employee-members was to use the ESOP to become owners of the plant to the exclusion of the respondent.[4] For these reasons, I find that the judge’s reliance on *Nephi* in the instant case is misplaced.

Based on the above, I find that the focus of George’s ESOP activities was on the improvement of an existing benefit of employment, a matter of immediate concern to employees. Therefore, George’s activities on behalf of the ESOP proposal were protected by the mutual aid or protection clause of Section 7 of the Act under *Eastex*, above. Having found that George engaged in protected concerted activities, I would adopt the judge’s alternative findings regarding the violations alleged, as set forth in footnote 11 of his decision. Accordingly, I would find that the Respondent violated Section 8(a)(1) of the Act by discharging George for his activities concerning the ESOP proposal and by otherwise interfering with his right to engage in protected activities.[5]

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[4] This critical relationship between the employees’ activities and the improvement of terms or conditions of employment was also absent in the additional cases relied on by the judge in the instant case to find George’s activities unprotected. In *Good Samaritan Hospital*, 265 NLRB 618 (1982), and *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980), the Board found unprotected employee complaints about the competency of management that concerned the quality of care offered by the program, and were therefore efforts to affect the ultimate direction and philosophy of the respondents. Similarly, in *N.Y. Chinatown Senior Citizens Coalition Center*, 239 NLRB 614 (1978), the Board found unprotected employee complaints that focused on the effect of the perceived mismanagement on the community, rather than on the working conditions of employees.

[5] I find it unnecessary to pass on the allegation, not discussed by the judge, that the Respondent violated Sec. 8(a)(1) by telling George that he could not distribute the leaflet when he was not scheduled to work.

present the proposal to the Promus board of directors. George began discussing this idea with other employees on approximately March 16.

Some employees told George they would be willing to take a more active role if he prepared a petition to sign. Accordingly, George drafted a three-page outline of a modified ESOP proposal and a cover letter addressed to Michael Rose, chairman of the Promus board of directors, from an ad hoc organization he called the ''Employee Shareholders Association.''

Under George's modified proposal, the ESOP trust would borrow $335 million to purchase 50 percent of the outstanding Promus stock (12,750,000 shares) at $25.25 per share. In addition, Promus would shift 50 percent ($450 million) of the current corporate debt to the ESOP trust as a form of equity allocation leaving the trust with a total debt of $785 million which was to be guaranteed by the future operating income of Promus. By this transaction, George believed, both the principal and interest on the total trust debt would become tax deductible and would result in an annual $31 million tax savings to Promus. This and other benefits flowing from the ESOP ownership would, in his view, be sufficient to implement the proposal ''at no cost to either the shareholders or the employees.''

On the evening of March 21, George began circulating 30 copies of his ESOP proposal and its cover letter in the employee cafeteria seeking signatures. Andy LaChapelle, Respondent's observation manager, was among the first to be provided with a copy of George's written ESOP proposal. When LaChapelle saw what was involved, he asked George to ''wait a minute,'' left the cafeteria, and returned in about 5 minutes with Ira Katz, Respondent's employee relations manager.

Katz asked George to stop distributing his proposal temporarily because it had not been cleared by Janet Beronio, Respondent's human resources director. When George protested on the ground that it would cause him to loose momentum, Katz grew more insistent that George discontinue his activity. Finally, George asked to speak with someone with authority to approve his activity in Beronio's absence and Katz agreed to this suggestion.

Shortly thereafter Katz located William Thistle, an attorney in Respondent's legal department, who agreed to speak with Katz and George in his office.[4] Following a few innocuous questions, Thistle told George that he must follow two ground rules: (1) distribution and solicitation must be limited to break areas and breaktimes; and (2) nothing could be said to imply that upper management endorsed his ESOP proposal. Katz chimed in saying, ''you have the right to solicit, but the company has the right to say how.'' Thistle nodded affirmatively and further discussion followed which is not pertinent here. As George and Katz departed, Katz patted George on the back and said, ''except for those two ground rules, you're free to fly.''

[4] Because George began soliciting on March 21 within an hour of his swing shift starting time, which would have been after regular business hours for most of Respondent's executive offices, Katz, who telephoned several offices, had some difficulty locating an executive on the premises. When Katz reached Thistle and initially explained the reason for seeking an audience, George says he overheard Thistle tell Katz ''they have the right to organize.''

After the exchange with Thistle, George continued to solicit signatures on his breaktimes in the employee cafeteria, the rest lounge, and the toke room with some degree of success.[5] However, two or three employees complained that the proposal was too technical. George discussed revising his written proposal with another employee and during their conversation the idea emerged to call the ESOP proposal ''Money For Nothin',' a title used and service marked by Respondent a couple of years earlier for a customer promotion program.[6]

Word of George's plan obviously spread quickly to top management. Lou Phillips, Respondent's senior vice president and general manager, approached George's baccarat table that evening and said with a slight smile: ''Larry, what are you trying to do, are you trying to destroy my company.'' George told Phillips that he was only trying ''to give you one of the most dynamic and profitable service companies in America.'' A brief exchange continued about George's earlier efforts and concluded with George asking Phillips to ''wish us good luck with this.'' Phillips replied, ''Larry, I wish you very good luck with this.'' In a teasing fashion George asked if he could quote Phillips and Phillips said no.

3. March 22: The Money For Nothin' flyer

The following morning, George set about revising and simplifying his written proposal which was to bear the Money For Nothin' title. His revision briefly summarized his ESOP proposal and asked employees to sign the Rose letter ''when it comes [y]our way.''

George then took the text to a local print shop to arrange for the printing of 3000 copies. Because of his limited personal budget, George condensed the text so that two copies could be printed on a standard 8-1/2 by-11 inch paper stock and then cut, thereby doubling the output without materially increasing the cost of printing.

George selected a cream colored paper and green ink for the job in an effort—he claims—to match the colors on a $10 or $20 bill. When the printer declined to schedule the job for completion that afternoon as George desired, he went to an adjacent shop which agreed to his time schedule and specifications. To meet those specifications immediately, the second shop had to borrow the cream colored paper stock from the other shop.

On the evening of March 22 George distributed stacks of his Money For Nothin' flyer at locations in the front and rear of the employee cafeteria and rest lounge where Respondent normally stacks its publications for distribution to employees. In addition he personally distributed individual flyers to employees present in those areas. During break periods, George replenished the stacks and again distributed the flyers to employees in those areas at the time.

[5] The toke room is a location in the facility set aside for the exclusive use of the dealers to count their pooled tips for distribution evenly among all dealers. This process all takes place on nonworktime. Unlike the employee cafeteria and the rest lounge, managers and supervisors are almost never in the toke room.

[6] Generally speaking, a service mark is defined as a trademark related to services rather than products. 74 Am.Jur.2d, *Trademarks*, § 3. Respondent used the Money For Nothin' customer promotion again shortly before the hearing. The nature of the program is not described in the record.

That same day, the Company distributed copies of a weekly in-house employee newsletter called *Happenings*. That publication was printed in black ink on green 8-1/2-by-11 inch paper stock, folded in half, so as to make a small four-page publication from a single sheet. Admittedly, George placed his flyers near stacks of the current *Happenings* issue.

No management official interfered with George's distribution that evening. However, Herb McElvy, George's immediate supervisor, told George that he had observed someone putting copies of the flyer inside the newsletter and asked George how he had obtained approval of his flyer for the newsletter. George denied that he had taken such action and told McElvy forthrightly that he had not obtained such approval. The matter passed without further comment.

4. March 23: The decision to discharge George

Janet Beronio claims that several company newsletters were found in the cafeteria on March 23 with Money For Nothin' flyers inside.[7] Beronio felt that the appearance of the flyer involved too many coincidences to ignore. Specifically, she noted that the flyer—in the green and buff colors recently adopted by Promus for its publications, titled with words from a company promotion and correctly sized for insertion in the company newsletter—appeared at the casino with the distribution of the then current newsletter. These circumstances, she believed, inherently implied management approval of the Money For Nothin' flyer contents whereas the three-page proposal, standing alone, did not.

After consulting with Phillips, Beronio passed a directive to William Ambrosio, the swing-shift casino manager, to determine whether George had produced the flyer and, if so, to discharge him. Phillips and Beronio decided to discharge George because he had been specifically counseled by Thistle and Katz against representing the ESOP proposal as company endorsed. Among other considerations, Beronio said that the price of the publicly traded Promus stock could be sensitive to a company-endorsed ESOP ownership proposal. Beronio says that the instruction passed to Ambrosio left him with no discretion to do anything other than discharge George if he determined that George produced the flyer.

5. George's discharge

George went to work early on March 23 in order to replenish the supply of flyers in the cafeteria and rest lounge. When he signed in for duty, he found a note requesting that he see Ambrosio immediately. George promptly went to Ambrosio's office. Pit administrator Larry Alsop was present and remained throughout the exchange between George and Ambrosio.

[7] Although Beronio's recollection concerning the source of this information was uncertain, she thought she had received this information from a security agent. No evidence shows that security agents had been alerted to George's activities. George was told during his discharge conference that Gary Gerous passed around a newsletter stuffed with the flyer at a management conference on March 23 attended by Phillips and Beronio which served to give everyone present the impression that George was attempting to imply management approval of his proposal. Considering the sophisticated nature of the implied message, I find it highly unlikely that a security agent—without prior instruction—would recognize such implications merely from finding flyer-stuffed newsletters.

After ascertaining that George was responsible for the Money For Nothin' flyer, Ambrosio said that was ''too bad'' because it gave everyone the impression that it was management endorsed. Reinforcing this assertion, Ambrosio alluded to the color of the print and paper stock, and demonstrated the flyer's size compatibility with the current *Happening*s issue by inserting a flyer inside.

George emphatically denied any intention to imply management endorsement. He demonstrated the basis for his color selections with a bill from his wallet. George also specifically denied that he had placed his flyer in the current *Happenings* issue and invited Ambrosio to tour the cafeteria and lounge areas to observe the distribution made only minutes earlier. Ambrosio declined.

Ambrosio then asserted that regardless of George's intent concerning management endorsement, company rules were violated by flyer's distribution in a work area, namely, the cafeteria. Ambrosio handed a copy of the no-distribution rule to George for his review and asserted that the cafeteria was a work area because employees of Respondent were employed there as cleaners, servers, and cashiers.[8] George argued that such a construction of the company rule on employee distribution effectively precluded him from any distribution on the premises.

When pressed by George to identify his accuser, Ambrosio told George about the management meeting that day and of Beronio's concern over the implications of the Money For Nothin' flyer's appearance at the casino in conjunction with the distribution of the *Happenings* newsletter. George again emphatically denied that the thought of distributing the flyer in that fashion had ever crossed his mind. Instead, George admitted, the only thing that was ever of any concern was the Money For Nothin' title because of some company interest in the phrase but he felt it was necessary to ''push it to the limit'' because he believed that he was ''playing with a deck stacked against [him].''

Ambrosio shook his head and said ''Larry, I'm sorry, you just hung yourself.'' Rejecting George's appeal that he report back to Beronio and give her an opportunity to reconsider, Ambrosio signed what amounted to a termination notice and handed it to George to enter his written comments.

The portion of the termination notice (G.C. Exh. 3) prepared by Ambrosio reads:

> Larry is being terminated for violating the distribution of literature by an employee in a work area (cafeteria) on the night of 3/22/90.

6. George's reinstatement

Sometime following his discharge, George spoke with Phillips by telephone. George asked if Phillips was aware that he had not inserted his flyers in the newsletter. Phillips said that he was not and advised George that he would look into the matter.

[8] Sec. 21 of Respondent's Policy/Procedure Guide concerning prohibited conduct, in part, provides: ''Distribution of literature of any type or description by employees in working areas is prohibited.'' See G.C. Exh. 5. The same language is used in another Policy/Procedure Guide related to solicitation and distribution of literature. See G.C. Exh. 6.

That evening George received a telephone call from Ambrosio who advised George that his discharge had been downgraded to a suspension and that he was to report for work on April 4. Ambrosio explained this action had been taken because doubt existed about his ''intent'' and advised ''you've had your one warning.''

Before returning to duty, George met with Ambrosio, Thistle, and Ron Beronio in Thistle's office. George was asked about his future intentions with respect to promoting his ESOP proposal. George told these officials: ''At this point . . . my intention is to only promote this on a national level for employees of all corporations. In other words, Promus Company is off the hook.''

Thistle asked if George clearly understood what was a work area and what was a break area. George replied that he understood that the cafeteria was a break area if management liked what he was doing and a work area if they did not. Beronio interposed a strong exception to George's characterization and addressed the subject in detail. At some point in this discourse George was asked if he ''would at least have the courtesy to have these things reviewed in the future with somebody in management.'' George agreed that he would. At the conclusion of this meeting Ambrosio prepared a handwritten memorandum for George's personnel file. Ambrosio stated in pertinent part:

> Larry now fully understands the cause of this suspension was based on his violation of the soliciting policy of this company. He also now fully understands what constitutes a ''working area'' and ''break time.'' In the future he will give us the courtesy of having the Legal Department review and approve *all* written material that he wishes to distribute during his ''break time'' in a ''non-working area.'' Any action on his part that violates this agreement will result in his termination. [Emphasis added.]

Since returning to work, George has not distributed any literature related to his ESOP proposal for fear of being discharged again. However, Janet Beronio said that George had sought approval of other literature for distribution and had been told that he could distribute whatever he wanted so long as he does not represent it to be company endorsed and it is not obscene. George said that shortly before the hearing, Beronio had taken the position with him that the toke room was a work area.

B. *Further Findings, Argument, and Conclusions*

Section 7 of the Act provides that employees have the right ''to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.'' Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees for exercising rights guaranteed in Section 7.

The General Counsel argues that George's activities on behalf of the ESOP proposal are protected by Section 7. Accordingly, the General Counsel alleges that Respondent interfered with George's protected activities: (1) on March 21 by Katz' remark that the Company could tell George how to solicit and Thistle's advice that George could not solicit on company property when not scheduled to work; (2) on March 23 by discharging George and advising him that the distribution of literature in the employee cafeteria violated Respondent's prohibition against distributing literature in working areas; and (3) on April 4 by Ambrosio's request for prior review of all future distributions by George.

Respondent argues either that the alleged unlawful conduct did not happen or, if it admittedly did happen, it was not unlawful. In particular Respondent argues at length that George was discharged because he misrepresented his ESOP proposal to be endorsed by management.

George's account of what transpired is largely uncontradicted and is credited. Nevertheless, I have concluded that George's activities on behalf of his ESOP proposal are not protected by Section 7.

Section 7 protections are not boundless. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court defined the scope of the ''mutual aid and protection'' clause in Section 7—involved here—as limited to those matters involving ''employees' interests as employees.''[9] The Court felt no need to further delineate the boundaries of the clause because ''[t]hat task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.''

The strategic overall objective of George's ESOP proposal is to transfer ownership and control of Respondent's enterprise, committing huge sums of corporate capital in the process. Although a variety of benefits to employees could result from this transformation, such benefits presuppose corporate ownership by the employees. The essential thrust of George's proposal is to cast employees in the role of buyers of corporate equity.

The Board has held that decisions such as selling an employing enterprise involve matters ''at the core of entrepreneurial control.'' *General Motors Corp*., 191 NLRB 951 (1971). Having so concluded, the Board held that an employer has no duty to bargain under the Act with the employee representative concerning the decision to sell the employing enterprise.

Because the heart and soul of George's ESOP proposal involves a matter intimately connected with the entrepreneurial control of Respondent, General Counsel has failed to establish the essential ''direct relationship between the alleged [unlawful conduct] and [the Board's] traditional and primary functions of fostering collective bargaining, protecting employee rights to act concertedly, and conducting [representation] elections.'' *Jubilee Mfg*., 202 NLRB 272 (1973). As the *General Motors* case concludes essentially that the buying and selling of an employing enterprise lies at the core of entrepreneurial activity, establishing protection under the Act for employees to engage in such activity is impossible to reconcile with the Board's ''traditional and primary functions.''

This conclusion accords with the decision by Administrative Law Judge Jay R. Pollack in *Nephi Rubber Products Corp*., 303 NLRB 151 (1991). There Judge Pollack held that certain employee members of an ESOP trust who competed actively against another buyer for the purchase of the facility where they formerly worked were not engaged in concerted

[9] In *Eastex*, the Court affirmed enforcement of a Board decision finding the employer unlawfully banned the distribution of flyers promoting employee action in opposition to a state right-to-work amendment and a Presidential veto of a Federal minimum wage bill. The employer argued that the flyer was political in nature and not protected by the ''mutual aid and protection'' clause.

activity within the meaning of Section 7 because ''they were not acting to improve their lot as employees but rather as entrepreneurs.''

Consequently, Judge Pollack dismissed the 8(a)(1) allegation against the successful buyer based on its failure to hire some ESOP officials prominent in the purchase competition when the facility resumed operation. To support his conclusion, Judge Pollack relied on *Retail Clerks Local 770*, 208 NLRB 356 (1974), and its progeny, holding that employee activity designed solely to influence or produce changes in the management hierarchy is not protected by Section 7.[10]

The increased pay, job stability, and pension funding envisioned here under the expanded ESOP, and cited by the General Counsel as supporting the protected nature of George's activity, are all incidental benefits flowing from a basic alteration of corporate ownership and control sought by George. As presently constituted, the ESOP trust obviously does not set corporate policy and could not except in the extremely unlikely event that the present owners become almost evenly split about some issue. In contrast, any 50-percent shareholder, including the ESOP trust, would control as a practical matter every detail of corporate policy. For this reason, George's ESOP distributions involve matters outside the sphere of employee interests ''as employees.''

Although George's ESOP activities were in no way unlawful and may well embody a business philosophy which could lead to increased productivity and other desirable social consequences, I find, nevertheless, that such activities are not protected by the ''mutual aid and protection'' clause of Section 7. General Counsel's reliance on *El San Juan Hotel*, 289 NLRB 1453 (1988); *Mitchell Manuals*, 280 NLRB 230 (1986); and *Veeder-Root Co.*, 237 NLRB 1175 (1978), is misplaced. To the extent that the literature distributed in those cases address questions of ownership and management, those matters are raised only because of their impact on employee working conditions; in none of those cases did employees seek a role other than as employees. By contrast, George's ESOP proposal and his distributions are his blueprint for recasting employees collectively as the controlling corporate stockholders of the whole Promus enterprise.

Accordingly, I find that Respondent was actually at liberty to bar George's ESOP distributions altogether and, hence, it did not violate Section 8(a)(1) by the conduct of Katz and Thistle on March 21, or by discharging George on March 23 for distributing his ESOP literature in the employee cafeteria on March 22.[11]

Respondent's action in reinstating George on April 4 was unquestionably a humane gesture. However, the terms of his reinstatement as expressed in Ambrosio's memorandum to George's personnel file and George's account of the preemployment conversation do transgress George's Section 7 rights. The personnel file memo—shown to George—in particular shows on its face that George must accord management the courtesy of reviewing all of the literature he desires to distribute at Respondent's facility or risk being discharged again. As that memo extends the prior review requirement to matters which could fall within the protection of Section 7, it is unlawfully broad. See *Brunswick Corp.*, 282 NLRB 794 (1987), and the relevant cases cited therein. Accordingly, I find that this action violates Section 8(a)(1) as alleged.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce, and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By requiring Larry George to submit for prior management review all literature he desires to distribute among employees on nonworktime in nonwork locations at its facility, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

3. Respondent did not engage in other unfair labor practices alleged in the complaint of the General Counsel in Case 32–CA–11182.

4. The unfair labor practice specified above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in a certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

As the instruction to George concerning prior review of literature is memorialized in his personnel file, I deem it appropriate to require that this directive be expunged from his file in accord with the procedures in *Sterling Sugars*, 261 NLRB 472 (1982). Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

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[10] Progeny cases cited by Judge Pollack were: *Good Samaritan Hospital*, 265 NLRB 618 (1982) (holding employee complaints about the ultimate direction, philosophy and managerial policies of a hospital's developmental learning program not protected); *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980) (holding employee complaints that incompetent management affected the quality of client care not protected); and *N.Y. Chinatown Senior Citizens Coalition*, 239 NLRB 614 (1978) (holding ''aggravated bickering'' directed at a new executive by employees for the purpose of effecting a change in top management not protected).

[11] If George's ESOP activities were protected, I would still disagree that Katz' remark—''you have the right to solicit, but the company has the right to say how''—to George on March 21 violated the Act as General Counsel argues. Considering the two lawful ground rules Thistle explained during that meeting and Katz' reference to the ground rules at the conclusion of the meeting—''except for those two ground rules, you're free to fly''—Katz' remark was superfluous in the overall context of that meeting. Otherwise, I would find a violation in all other instances dismissed here. Respondent's assertion that George was discharged for implying that Respondent endorsed the March 22 distribution lacks merit. Regardless of the reason underlying Phillips and Beronio's decision to discharge, Ambrosio actually discharged George for distributing his March 22 literature in the employee cafeteria which is clearly a nonwork area by standards applied in these cases.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [12]

ORDER

The Respondent, Harrah's Lake Tahoe Resort Casino, Statline, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring its employees to submit any literature protected by Section 7 of the Act for review by management prior to distributing it at Respondent's facility in accord with its employee distribution rules.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful requirement that Larry George submit all literature he intends to distribute at Respondent's facility for prior management review and notify him in writing that this has been done and that he will not be subject to termination for failing to do so.

(b) Post at its facility in Stateline, Nevada, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT require our employees to submit any literature concerning matters covered by Section 7 of the Act for review by management prior to distributing it at our facility in accord with our written employee distribution rules.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL remove from our files any reference to the requirement that Larry George submit all literature he intends to distribute at our facility for prior management review, and notify him in writing that this has been done and that he will not be subject to termination for failing to do so.

HARRAH'S LAKE TAHOE RESORT CASINO